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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT WASHINGTON et al., Plaintiffs and Appellants, v. FERRELLGAS, L.P., Defendant and Respondent.	E045255 (Super.Ct.No. RIC423336) OPINION

APPEAL from the Superior Court of Riverside County. Gianni R. Driller, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Scolinos, Sheldon & Nevell and Todd F. Nevell for Plaintiffs and Appellants.

Law Offices of Fletcher, White & Adair, Paul S. White and Michael McMullen for Defendant and Respondent.

Plaintiffs and appellants Robert Washington and Edward Cannon appeal after the trial court granted summary judgment in favor of defendant and respondent Ferrellgas,

L.P. (Ferrellgas), in an action for negligence resulting from a propane gas explosion. We reverse the judgment.

FACTS AND PROCEDURAL HISTORY

Jose Flores and Ana Cervantes (sellers) had owned a home in Cabazon, California. In 1999, they leased a propane tank from Ferrellgas to provide propane service to the home. After the tank was installed, the sellers purchased propane from Ferrellgas from time to time. They last purchased propane from Ferrellgas in 2002, about two years before the fire that is the subject of the litigation. The sellers used a propane heater to heat the home, and a gas clothes dryer that was located in the garage.

The sellers sold the home in late 2003 to early 2004, and moved out in January 2004. The sellers disconnected and removed the dryer from the garage on January 8, 2004. Before removing the dryer, the sellers turned off the gas at the propane tank.

Wattana and Potchanai Srisoopan purchased the home for their daughter and her husband, Mena and Robert Washington, who had recently married. The sale of the home closed on February 27, 2004, and the Washingtons began moving their belongings in on the following day. The Srisoopans bought a clothes dryer for the newlyweds to install in the garage and delivered it on the day before the accident.

Potchanai Srisoopan testified that when he delivered the dryer, he noticed an uncapped gas pipe in the garage. He could not remember whether he specifically told the Washingtons about the uncapped pipe, but he told them that he needed to get the proper fittings to install the dryer, and he told Robert Washington "'don't mess with it.'"

On February 29, 2004, Robert Washington was attempting to start the propane heater in the house. He turned up the heater thermostat, and turned the propane storage tank control to "'on.'" When the heater did not come on, he called his friend, Edward Cannon, to assist him. Cannon arrived about 15 minutes later and met Washington in the garage. Cannon noticed a gas odor in the garage, and told Washington, "'The garage is full of propane gas.'" Cannon told Washington, "'don't do anything,'" but also instructed him to air out the garage. When Washington activated the garage door opener, a flash fire explosion occurred, injuring Washington and Cannon and causing fire damage to the residence.

Plaintiffs filed a complaint for personal injury against the sellers, and eventually, against Ferrellgas as well, as the owner of the propane tank.

Ferrellgas moved for summary judgment on the basis that it was not responsible for and had no knowledge of the uncapped gas line in the garage. Ferrellgas alleged that it had no knowledge that the sellers had moved out of the residence, and it was never asked to inspect, service or repair any of the piping or appliances to the home. Ferrellgas had no knowledge of any leaks in the propane gas system.

In opposition to the motion, plaintiffs asserted two causes of the explosion: an unlocked (and unremoved) propane tank left on the premises after the sellers had moved out of the house, and an uncapped pipe in the garage. Plaintiffs argued that disputed issues of material fact existed because the sellers did contact Ferrellgas and informed Ferrellgas that they were canceling their propane service and vacating the property. On

the basis of this notice, plaintiffs asserted that Ferrellgas had a duty either to remove or to lock off their propane tank and also to conduct a leak inspection before allowing new occupants access to the propane tank.

On January 8, 2004, the sellers moved out of the house. On January 14, 2004, they telephoned Ferrellgas to discontinue their propane service. A former Ferrellgas district manager testified to the proper procedures for shutting off and installing propane service. If a customer were to move and cancel service, a service representative would ascertain the date service was to stop, schedule a service call at the residence to shut off the tank and remove the regulator or a piece of equipment called a "pigtail." Once a new customer requested service, a second service call would be scheduled to replace the regulator and pigtail. A leak test would also be conducted at that time to determine whether there were any open or uncapped lines. The district manager testified that the regulator and pigtail were removed for any cancellation of service, "[a]s long as we knew when [the customers] were moving." Ferrellgas relied on the customer to notify them when the move was taking place. The tank would be tested for leaks whenever it was filled, but the lines were tested for leaks only when a new customer had requested service, or upon the customer's request. In the case at hand, Ferrellgas's records showed that the sellers had called to say they were moving, but no date was noted for when the premises would be unoccupied. Ferrellgas also received no request from a new customer at the address. The seller testified that he telephoned Ferrellgas to inform them that he had sold the house. He cancelled the service, and "I told them to go get their tank." The

Ferrellgas representative asked for the buyers' names, but the seller did not know. The Ferrellgas representative stated that the sellers' service had been cancelled, but Ferrellgas would wait for the new owners to call to set up new service.

Ferrellgas responded that there was no disputed issue of material fact to show that Ferrellgas knew there was a leak caused when someone removed an appliance in the home and failed to cap the gas line. Even though Ferrellgas's district manager testified generally concerning Ferrellgas's procedures when ending service to one customer and initiating service to another, company records suggested that the sellers did not provide Ferrellgas with a specific move-out date.

The trial court granted Ferrellgas's motion for summary judgment. Plaintiffs filed a timely notice of appeal.

ANALYSIS

I. Standard of Review

On review of a summary judgment, we "examine the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc*. (2002) 97 Cal.App.4th 1142, 1149.) In conducting this independent review, we apply the same three-step process required of the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor. If so, we move to the third and final step: determining whether the

opposition demonstrates the existence of a triable, material factual issue. (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

II. Step One: Issues Tendered by the Pleadings

Plaintiffs' complaint originally named only the sellers as defendants; it was later amended to add Ferrellgas in place of Doe 3. The sole theory stated in the complaint was negligence. The complaint alleged that plaintiffs were injured by a propane gas explosion at the property. Plaintiffs alleged that, "before said defendants [i.e., the sellers] moved out of the property, they failed to place a safety cap on the propane valve running from the propane tank into the garage area." Plaintiffs alleged that the duty to place a safety cap was a nondelegable duty. The defendants knew or should have known that the absence of a safety cap was a dangerous condition with an unreasonable risk of harm to later occupants. The defendants allegedly failed to take steps either to make the condition safe or to warn plaintiffs.

Plaintiffs also alleged that before the explosion, "defendants were present inside the subject property to inspect the propane gas system and other aspects of the home, yet they did nothing to correct the dangerous condition created by the lack of a safety cap on the gas valve or warn the plaintiffs and others about such dangerous condition." Plaintiffs further alleged that they were injured as a result of the explosion and suffered damages.

The critical elements of plaintiffs' negligence cause of action, vis-à-vis Ferrellgas, was whether Ferrellgas owed a duty to plaintiffs, whether it breached that duty, or whether its breach (if any) caused the damage.

III. Step Two—The Moving Papers Showed That Ferrellgas Was Entitled to Judgment in Its Favor

Ferrellgas alleged in the statement of undisputed material facts that Ferrellgas had leased a propane tank to the sellers in 1999. Ferrellgas last delivered propane to the tank in May 2002, about two years before the accident. That was the last time Ferrellgas had any contact with the propane system. At the time of last contact, all elements of the system were working properly. Ferrellgas had no notice at any time that there were any problems with the propane system.

The sellers shut off the propane supply at the tank when they moved from the residence.

Ferrellgas did not know that the dryer, or any other appliance, had been disconnected from the system. Ferrellgas asserted that it had not been told of any intended vacancy date when the sellers moved out of the house. Ferrellgas asserted that it had no knowledge that the sellers had in fact moved out of the house. Ferrellgas did not know the names of the new purchasers, and did not know when or if the new occupants had taken possession of the premises. Ferrellgas did not know that anyone was trying to activate the propane system on the date of the accident.

The sale of the home closed on February 27, 2004. The Washingtons started moving in the next day. The Srisoopans bought a new gas dryer to put in the garage. At the time that Potchanai Srisoopan wanted to install the dryer, he noticed that the gas line to the garage was uncapped.

On the day of the accident, the Washingtons were trying to initiate the furnace. Robert Washington turned on the gas valve at the tank and turned on the heater thermostat. When the furnace did not turn on, he called his friend Edward Cannon. Cannon arrived about 15 minutes later and informed Washington that the garage was full of propane gas. When Washington pressed the garage door opener to air out the garage, the gas fumes ignited, causing injury.

Ferrellgas relied on *Salazar v. Southern Cal. Gas Co*. (1997) 54 Cal.App.4th 1370, for the proposition that "a gas company which does not install or maintain gas lines in its customer's premises and is not responsible for their maintenance is not liable for injuries caused by leaks in the lines of which it has no knowledge." (*Id.* at p. 1377.)

In *Ambriz v. Petrolane, Ltd.* (1957) 49 Cal.2d 470 (*Ambriz*), the California Supreme Court explained the parameters of gas company liability:

First, if the gas company knows, when it first turns on the gas, that there are defects in the customer's pipes such as leaks or other unsafe conditions, the gas company is under a duty to inspect to ascertain the safety of the pipes before furnishing the gas. (*Ambriz, supra*, 49 Cal.2d at p. 478.)

Second, if the company learns after the gas is turned on that the customer's pipes have become rusted, corroded or damaged so as to allow gas to escape, it "must cause the line to be repaired" by the customer, or it must shut off the gas. (*Ambriz, supra*, 49 Cal.2d at p. 478.)

However, once the gas is turned on, the gas company has no duty to inspect the customer's gas lines absent notice of a leak. (*Ambriz, supra*, 49 Cal.2d at p. 479.)

Ferrellgas showed that it had no notice of any gas leak, any equipment failure or removal, any uncapped pipe, or any other condition. It had met its initial duty to the sellers to insure the safety of the pipes when it had installed the tank and connected the system. There were no reported problems over the next four years, and no requests for any filling of the tank for approximately two years before the accident.

Although the sellers did tell Ferrellgas that they had sold the home, they did not inform Ferrellgas of any move-out or move-in date. They also provided no notice that an appliance had been or would be removed, and no notice that the line to the disconnected appliance would be left uncapped.

The new owners did not contact Ferrellgas, and provided no notice of any move-in date. Ferrellgas was not notified that the new owners or occupants intended to use any propane service, that they would attempt to install or operate the system or any appliances, that they would uncap a line in attempting to install an appliance, or that they had observed an open, uncapped pipe on the premises.

This showing was sufficient to entitle Ferrellgas to judgment in its favor. It had fulfilled whatever duty it owed at initial installation of the tank, and thereafter had no notice of any leaks or other dangerous conditions.

IV. Step Three—Plaintiffs' Showing Was Sufficient to Raise a Triable Issue of Material Fact

Plaintiffs relied heavily on the testimony of Ferrellgas's former district manager, concerning the procedures Ferrellgas normally used in initiating or terminating service, to establish disputed material facts. Specifically, plaintiffs cited testimony that, "[w]hen an existing Ferrellgas customer is moving and calls to cancel their propane service, Ferrellgas schedules a serviceman to go out on the day of the move to disconnect the tank so that gas can no longer flow into the house." Ferrellgas removes the regulator and pigtail "as a safety precaution to prevent the system from being used again before a leak test is performed and the lines going into the house are checked." Ferrellgas does not typically remove its propane tank, but leaves it in place to encourage the new customer to solicit propane service from Ferrellgas. Ferrellgas also solicits the name and telephone number of the prospective new occupant when premises are being vacated, so that it can encourage the new occupant to become a new Ferrellgas customer. Nevertheless, even when the tank is left on site, Ferrellgas "'locks off'" its tank before it is activated again for the new customer. Plaintiffs urged further that, "Ferrellgas concedes that [its] propane tank should have been locked off on the date that the [sellers] vacated the property."

Plaintiffs urge that there are disputed triable issues of fact whether Ferrellgas had notice that the sellers had cancelled the service and vacated the premises. Ferrellgas counters that the pleadings framed no issues concerning when or if Ferrellgas had notice that the sellers had actually moved out of the home. If plaintiffs wished to assert such an issue, they were required to amend their pleadings; the summary judgment procedure is an inappropriate procedure to test and amend the pleadings. (See *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1069, fn. 7; see also *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 216.)

We disagree. The complaint alleged negligence. The trial court focused exclusively on the allegations that the accident was caused by the uncapped pipe in the garage, refusing to consider any other specific negligent conduct contributing to that condition. But there was no contradiction here between the species of negligence attributed to Ferrellgas and the broad allegations of the complaint; the particular negligent conduct attributed to Ferrellgas explained rather than contradicted the allegations of the complaint.

The duty of a gas company, as explained in *Ambriz,* addresses precisely the kind of danger alleged in the complaint. The duty owed on initiation of service is to ascertain the safety of the pipes. The duty imposed is designed to guard against the very danger that existed here of an open line or uncapped pipe. While Ferrellgas would not necessarily have been aware, when starting new service for the buyers, of the removed appliance or open, uncapped pipe, it would know immediately upon turning on the gas

that the system was leaking. It would then have had a duty to inspect to discover the source of the leak, which would lead to discovery of the open, uncapped pipe in the garage.

It was disputed whether, on the one hand, it was the sellers who failed to give, or, on the other hand, it was Ferrellgas's service representative who failed to ascertain or to note, a specific move-out date when the sellers vacated the property. It is undisputed, however, that the sellers did telephone on January 14 to cancel their propane service. It was undisputed that Ferrellgas's policy was to schedule a technician to lock off the tank and remove the regulator and/or the pigtail when propane service was canceled. For whatever reason, Ferrellgas did not send a technician and did not lock off the propane tank. At the time of the explosion, the regulator and pigtail were still in place.

This was sufficient to raise a triable issue of material fact whether Ferrellgas failed in its duty to the sellers, and/or the new occupants, to ensure that the propane gas, a highly dangerous commodity, could only be accessed safely. Ferrellgas did not have a duty as to conditions of which it did not have notice, but it did have notice that the sellers had sold the home and either had moved out or would soon move out, leaving the premises unoccupied. It was undoubtedly to address dangers such as an open, uncapped pipe left by removal of appliances by vacating sellers that Ferrellgas adopted its lock-off or removal policy.

Whether a duty is owed depends upon several factors, not the least of which is the foreseeability of harm to others. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) It is

foreseeable that owners of real property could remove propane appliances when they sell the property and move. It is foreseeable that the new occupants would attempt to install or operate propane appliances. It is foreseeable that removal of appliances or installation of new ones could result in an open propane gas line. It is foreseeable that, when a property is unoccupied or changing hands, inexpert or unscrupulous persons could access propane, an inherently dangerous material (*Ambriz*, *supra*, 49 Cal.2d at p. 477), unless the tank is removed or locked off.

The other conditions underlying imposition of a duty—the degree of certainty that the party has suffered injury, the closeness of the connection between the condition of the property and the injury, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden the duty would impose compared to the benefit to the community from imposing the burden, and the practical availability of insurance for the risk involved—militate in favor of imposing a duty in this case. The certainty of injury is undeniable, the connection of the unlocked propane system to the injury was immediate, there was some moral blame attached to Ferrellgas's failure to secure its tank when it knew the property was to be vacated, the policy of preventing future catastrophic harm was paramount, and the burden on Ferrellgas of scheduling a lock-off of its tank was routine. This analysis supports imposition of a duty here. To determine that no duty was owed should not hinge upon such a trivial matter as whether the sellers specified a particular move-out date. Indeed, the evidence does not clarify whether it was the sellers who failed to state a particular move-out date, inasmuch as they

had already moved out before they called Ferrellgas, or whether the failure was Ferrellgas's. Its telephone receptionist might have failed to ask or failed to note a move-out date, or simply forgotten to schedule a technician visit. The sellers would be unaware of the importance of specifying a particular move-out date; as far as they knew, they were reassured that their service was "canceled" as of the date of their telephone call. Ferrellgas's district manager testified, on the other hand, that its telephone representatives were particularly trained to ascertain a move-out date. Ferrellgas knew that it had last supplied propane to the sellers about two years earlier; "cancellation" of service was thus not merely to stop future deliveries, because none had been scheduled. Therefore, whether or not it knew of a specific move-out date, Ferrellgas knew the service was "cancelled," and it was on notice that it should remove or lock off its tank. Ferrellgas was not entitled to wholly avoid trial based solely upon such ambiguities as which party was to blame for not specifying an exact move-out date.

The salient point is that Ferrellgas was on notice that the property was, or was imminently to be, vacated. The new occupants should not have been allowed access to the unlocked propane system without a service call. Ferrellgas's initiation of service to new customers included a duty to test the tank, the lines and the appliances, to make sure the system was safe. Leaving the tank unlocked allowed anyone access to the dangerous system without the performance of the required safety check, which would have disclosed the open garage line condition.

It is clear that, in granting summary judgment, the trial court focused on an exceedingly narrow reading of the pleadings: "I'm not sure that there was a duty to lock off the tank upon notice of cancellation. . . . [¶] Even if there was such a duty, again, I go back to the allegations of the Complaint, and I don't see anything in the allegations of the Complaint that states that the duty . . . was breached by . . . this defendant . . . based upon its failure to go out and shut off the tank upon notice of cancellation. My reading of the Complaint is that it is based simply on the fact that the defendants did not inspect or defendants failed to make sure that there was a safety cap on the valve at the time the prior owners moved out. [¶] To me, that's a different argument or a different allegation than the ones you're making today and that were in the opposition that they had a duty to go out and shut off the tank upon notice of cancellation. I think that's because this defendant was added as a Doe subsequent to the Complaint being filed. The allegations were focused more on the previous homeowners and their duty, and by adding the Doe and the Doe defendant, it didn't really contemplate any additional allegations of duty. So I'm restricting it to the allegations of the Complaint. That's the way I interpret it, and based upon that, I don't see any duty owed by this defendant."

We disagree. As noted, the complaint alleged negligence, the duty analysis militates in favor of imposing or finding a duty, and that duty encompassed acts which would have discovered or prevented the specific harm pled, with respect to the open line or uncapped pipe.

DISPOSITION

Plaintiffs' showing in opposition to the motion for summary judgment was sufficient to raise a triable issue of material fact, i.e., Ferrellgas failed to negate the elements of duty, causation and breach with respect to a claim of negligence against it. The trial court found no duty based on an overly narrow reading of the complaint; the duty owed by Ferrellgas was designed to address the very cause of the injury from an open, uncapped line. For these reasons, the trial court erred in granting Ferrellgas's motion for summary judgment.

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

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/s/ McKinster
J.

I concur:

s/ King
J.

RAMIREZ, P.J., Dissenting

Today my colleagues hold that a complaint states a cause of action for negligence based on a duty not alleged or reasonably contemplated by the complaint. I respectfully dissent because the trial court's decision granting summary judgment to Ferrellgas is well grounded in case law and common sense; that is, it focuses on whether the complaint alleges any duty on the part of Ferrellgas to remove or disable the propane tank. The majority opinion, on the other hand, focuses on whether any such duty *can be* alleged, and concludes with very little discussion that the duty was *actually* alleged.

The Allegations in the Complaint

The complaint does not allege facts that give rise to a duty for Ferrellgas to make sure the propane tank is disabled or removed. The plaintiffs added this factual allegation only in opposing summary judgment. The allegations in the initial complaint were clearly aimed at the previous owners. Even after being amended to add Ferrellgas as a defendant, the complaint, with its allegations completely unaltered, does not reasonably contemplate negligence by Ferrellgas in not disabling or removing the propane tank.

The complaint's sole cause of action is negligence. In it the plaintiffs allege only the following: 1) each of the defendants is "legally responsible in some manner for the events and happenings as herein referred to, and legally caused injury and damages."; 2) "before said defendants moved out of the property, they

failed to place a safety cap on the propane valve running from the propane tank into the garage area."; 3) "defendants were under a duty to ensure that the gas valve inside the subject property was fitted with a safety cap" or to "warn the plaintiffs and others of [this] dangerous condition."; 4) "defendants were present inside the subject property to inspect the propane gas system and other aspects of the home, yet they did nothing to correct the dangerous condition . . . or warn the plaintiffs"; and 5) "defendants negligently owned, operated, managed, maintained or controlled the subject property[1] as hereinabove alleged thereby proximately causing" the injuries.

As one can see, the complaint does not mention any duty by any defendant to disable or remove the propane tank on the subject property. This is an entirely new theory, based on entirely new facts that are not set forth or even implied in the complaint. The focus of the complaint is that one of the defendants failed to either place a safety cap on the valve inside the garage or warn the plaintiffs that this safety cap was missing. The majority reads the complaint far too broadly because the complaint simply does not state or imply that any of the defendants had a duty to disable or remove the propane tank and failed to do so.

The majority opinion concludes without discussion that the new allegations of negligence against Ferrellgas raised in the plaintiffs' summary judgment opposition, and supported by evidence in the form of declarations, "explained

[1] The complaint defined "subject property" as "the residential property located at 14254 Ana Maria Street, Cabazon, California 92230."

rather than contradicted" the "broad" allegations in the complaint. I respectfully challenge the majority to directly quote from the complaint the particular allegations to which the majority opinion refers. More important, the majority owes to the parties a thorough discussion, with citations to supporting case law[2], regarding precisely how the new allegations and facts from the summary judgment opposition and declarations explain rather than contradict the allegations of the complaint.

Supporting Case Law

To repeat, the allegations in the complaint do not support the claim advanced during summary judgment that Ferrellgas had a duty to disable or remove the propane tank and neglected that duty. This was a complete shift in theory. I support this conclusion with the following citations to case law in which, as here, the specific cause of action (e.g., negligence, premises liability) does not change during summary judgment proceedings. Rather, in each of the cases cited

[2] The majority opinion does cite to *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1069, fn. 7.) The appellate court in that case concludes that, where the complaint is challenged and the facts indicate that the plaintiff has a good cause of action that is imperfectly pled, the trial court should give the plaintiff an opportunity to amend. This is certainly good law but does not apply to the facts of this case. This is because, as the majority opinion neglects to acknowledge, the plaintiffs here never asked to amend in the trial court, although they had plenty of opportunity. As Ferrellgas points out, plaintiffs filed their complaint in December of 2004, added Ferrellgas as a defendant in February 2006, Ferrellgas filed its motion for summary judgment in May 2007, plaintiffs filed their opposition in August 2007, and the trial court granted summary judgment on August 29, 2007. Further, judgment was not entered until December 19, 2007. This gave plaintiffs a large window of opportunity to amend, but Plaintiffs failed, for whatever reason, to take advantage of it.

and in the present case, the addition during summary judgment is in the factual assertions supporting a previously unarticulated duty or causation.

Significant tension exists between the majority opinion in this case and a recent opinion by a different panel of this Court. In *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242 (*Laabs*), the plaintiff was in a car accident. The complaint named the City, among others, in a dangerous condition of public property cause of action for "inadequate sight distances" and "lack of warning signs" at the intersection. In its motion for summary judgment, the City argued it did not own or control the intersection and was immune for several reasons. In opposing the motion, plaintiff for the first time argued that a light pole placed at the intersection by the City was a dangerous condition of public property that contributed to her injuries. The trial court granted summary judgment and this Court affirmed. The plaintiff could not raise the placement of the light pole for the first time in opposition to summary judgment. "'To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.]' [Citation.]" (*Laabs* at p.1253.) The panel in *Laabs* concluded that the new allegations that the placement of a light pole at an intersection caused the plaintiff's injuries contradicted rather than explained the original allegations that inadequate sight distances and inadequate warning signs caused the plaintiff's

injuries. Similarly, this Court should conclude that the new allegations that Ferrellgas's duty to disable or remove the propane tank from the yard and its failure to do so caused the injuries *contradicted rather than explained* the original allegations that the defendants had a duty to cap a valve in the garage or to warn of the cap's absence.

In the *Laabs* opinion, this court cited the following cases where, as here, summary judgment is upheld after the plaintiff alleges new facts, in opposition to summary judgment, to support the same cause of action but based on a different theory.

In *Lackner v. North* (2006) 135 Cal.App.4th 1188, the complaint alleged the defendant "negligently operated, maintained, and controlled the slopes so as to create a dangerous condition. It did so by permitting race participants to practice on runs not designated for training or racing, failing to warn its other patrons that participants were authorized to train on ordinary runs, and failing to take other precautions for the safety of persons using the slope." (*Lackner* at p.1202.) In opposing summary judgment, the plaintiff filed a supplemental statement of undisputed facts contending that Mammoth Ski Area (Mammoth) failed to post warning signs. The trial court granted summary judgment and the appellate court affirmed. "[A] separate statement of material facts is not a substitute for an amendment of the complaint. [Citation] Because [the plaintiff's] complaint fails to allege facts that give rise to a duty to post such signs, she may not assert Mammoths breach of that duty." (*Lackner* at pp. 1201-1202, fn. 5.) The plaintiff

in *Lackner* improperly tried to expand the factual basis for the dangerous condition cause of action. So here, the plaintiffs' complaint fails to allege facts that give rise to a duty by Ferrellgas to disable or remove the propane tank when asked to terminate service and told the subject property had been sold.

In *Turner v. State of California* (1991) 232 Cal.App.3d 883, the plaintiff was shot in a public parking lot. The complaint alleged causes of action for premises liability and negligence for failure to "provide adequate warnings and/or security." In opposing summary judgment, the plaintiff submitted evidence of inadequate lighting. The trial court granted the motion and the appellate court affirmed. "Nowhere [in the claim] is there any mention of inadequate lighting as a basis for the dangerous condition of property . . . ." (*Turner* at p. 889) Here, nowhere in the complaint is there any mention of a duty by Ferrellgas to disable or remove the propane tank from the yard, or that Ferrellgas's failure to do so caused the plaintiffs' injuries.

The approach relied upon by the trial judge is the proper one. The complaint as amended—focused on the duty to inspect the valve in the garage to make sure it had a valve cap, and on the duty to warn the plaintiffs that there was no valve cap. It is important repeat that the plaintiffs *never* asked to amend the complaint to include these allegations, a point that the majority opinion ignores.

Again, the majority opinion states that the trial court was too narrowly focused on the allegations regarding the uncapped valve in the garage, and that the kind of negligence attributed to Ferrellgas (failing to disable or remove the

propane tank when asked to terminate service and told the house was sold) does not contradict the allegations in the complaint, but rather explains them. I strongly disagree. This new theory of negligence does not explain the allegations in the complaint—it adds to them a completely new basis for recovery, that is, a previously unarticulated duty on the part of Ferrellgas to disable or remove the propane tank.

To conclude, I do not argue with the majority opinion's application of case law to the facts brought out at the summary judgment proceeding – that is, Ferrellgas may very well have had a duty to disable or remove the propane tank upon learning that the subject property had been sold. However, the burden rested with the plaintiffs to properly allege this duty in the complaint, or to timely amend the complaint after the trial court's ruling on summary judgment. The plaintiffs initially did not think to include allegations supporting such a duty in the complaint, and later did not bother to amend the complaint to accomplish this task. The fact that the plaintiffs *could have* alleged this duty does not make up for the fact that they did not *in fact* allege this duty. For this reason, I respectfully but emphatically dissent. Further, I believe this case presents an important and practical issue for litigators, and urge my colleagues to have the opinions in this case published.

RAMIREZ
P.J.